

ILLINOIS POLLUTION CONTROL BOARD
July 6, 2023

PARKER’S GAS & MORE, INC.,)
)
 Petitioner,)
)
 v.) PCB 19-79
) (UST Appeal)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

OPINION AND ORDER OF THE BOARD (by M. Gibson):

Parker’s Gas & More, Inc. (Parker) was the owner or operator of a service station in Adams County (site) at which underground storage tanks (UST) leaked petroleum. While performing corrective action at the site, Parker submitted to the Illinois Environmental Protection Agency (IEPA or Illinois EPA or Agency) a request for reimbursement of \$577,244.80 from the UST Fund. IEPA approved partial payment but modified the request by \$3,755.42. IEPA determined that remediation and disposal costs of that amount lacked supporting documentation. In an interim opinion and order on May 4, 2023, the Board found that the record supported Parker’s request for reimbursement. The Board reversed IEPA’s determination and directed IEPA to reimburse Parker the contested amount of \$3,755.42 from the UST Fund.

Parker now requests that the Board authorize payment of its legal fees. Below the Board finds that Parker’s appeal sought payment from the UST Fund and that it prevailed before the Board under Section 57.8(l) of the Environmental Protection Act (Act) (415 ILCS 5/57.8(l) (2020)); *see* 35 Ill. Adm. Code 734.630(g). The Board exercises its discretion to award legal fees and directs IEPA to reimburse Parker \$20,054.00 from the UST Fund.

The Board’s order begins below with an abbreviated procedural history. After providing the statutory and regulatory authorities, the Board discusses the issues, reaches its conclusion, and issues its order.

ABBREVIATED PROCEDURAL HISTORY

On December 21, 2018, Parker filed a petition for review (Pet.), which the Board accepted for hearing on January 17, 2019. On January 25, 2019, Parker waived its statutory 120-day decision deadline. *See* 415 ILCS 5/40(a)(2) (2020); 35 Ill. Adm. Code 101.308(c)(1).

After a status conference with the parties on July 16, 2019, the hearing officer reported that “[t]his case is part of a larger group of UST appeals involving the same parties. The status of this docket remains inactive as the parties work on other cases in this group.” After a status conference on October 13, 2020, the hearing officer reported that, “[i]f respondent can file the

administrative record before the next status call [on November 9, 2020], then motions for summary judgment will be scheduled.” On October 23, 2020, IEPA filed the administrative record of its determination (R.).

In an order on July 21, 2022, the Board denied the parties’ cross-motions for summary judgment and directed its hearing officer to proceed to hearing. The hearing took place as scheduled on November 15, 2022.

On May 4, 2023, the Board concluded that Parker had shown that its request for reimbursement did not lack supporting documentation and that the record supported Parker’s request for reimbursement. The Board found that IEPA’s denial of \$3,755.42 in reimbursement was incorrect and that IEPA must reimburse Parker that amount. The Board set a deadline for Parker to file a statement of legal fees that may be reimbursable and also set a deadline for IEPA to respond. On May 31, 2023, Parker filed its request (Req.), attached to which was the affidavit of Patrick D. Shaw (Aff.). IEPA has not filed a response.

STATUTORY AND REGULATORY AUTHORITIES

Costs associated with “corrective action” may be reimbursed from the UST Fund. 415 ILCS 5/57.9(a)(7) (2020). “‘Corrective action’ means activities associated with compliance with the provisions of Sections 57.6 [early action] and 57.7 [site investigation and corrective action] of this Title [XVI Petroleum Underground Storage Tanks].” 415 ILCS 5/57.2 (2020).

Section 57.8 of the Act addresses reimbursement from the UST Fund. Subsection (l) provides in its entirety that “[c]orrective action does not include legal defense costs. Legal defense costs include legal costs for seeking payment under this Title unless the owner or operator prevails before the Board in which case the Board may authorize payment of legal fees.” 415 ILCS 5/57.8(l) (2020); *see also* 35 Ill. Adm. Code 734.630(g).

BOARD DISCUSSION

Below, the Board first addresses whether this appeal falls within the scope of Section 57.8(l) of the Act. If it does, the Board next addresses whether it will exercise its discretion to award Parker’s requested legal fees and costs.

Whether Section 57.8(l) Applies

“The first question the Board must address is whether or not the proceeding falls within the parameters of the statutory provision.” Knapp Oil Co. v. IEPA, PCB 16-103, slip op. at 2 (Nov. 17, 2016), citing Ill. Ayers Oil Co. v IEPA, PCB 03-214, slip op. at 7 (Aug. 5, 2004) (Ill. Ayers).

Parker argues that “[a]ll of the legal costs sought herein were incurred ‘seeking payment under Title XVI and the plain language of Section 57.8(l) of the Act allows the awarding of legal fees.’” Req. at 2, citing Ill. Ayers, slip op. at 8. Parker asserts that it “prevailed in full in

reversing the only deduction challenged herein, a \$3,755.42 deduction for backfill material.” Req. at 3.

Because Parker prevailed when it sought payment from the UST Fund, the Board finds that this appeal falls within the scope of Section 57.8(l) of the Act. Accordingly, the Board below exercises its discretion to determine whether to award Parker its requested legal fees and costs.

Whether to Exercise the Board’s Discretion to Award Fees

Parker states that, in earlier cases, the Board considered the “reasonableness” of the claimed legal defense costs before exercising its discretion to authorize paying them. Req. at 2; *see Evergreen FS v. IEPA*, PCB 11-51, 12-61 (cons.), slip op. at 4 (Sept. 6, 2012). The Board agrees. *See City of Benton Fire Dept. v. IEPA*, PCB 17-1, slip op. at 3 (May 24, 2018) (Benton); *Prime Location Properties v. IEPA*, PCB 09-67, slip op. at 4 (Nov. 5, 2009) (Prime Location), citing *Swif-T Food Mart v. IEPA*, PCB 03-185, slip op. at 3 (Aug. 19, 2004); Ill. Ayers, slip op. at 8-9.

As the party seeking reimbursement, Parker has the burden of presenting sufficient evidence with which the Board can determine the reasonableness of the fees. Abel Investments v. IEPA, PCB 16-108, slip op. at 2 (Mar. 2, 2017); Prime Location, slip op. at 4, citing J.B. Esker & Sons v. Cle-Pa’s P’ship., 325 Ill. App. 3d 276, 283, 757 N.E.2d 1271, 1277 (5th Dist. 2001); Sampson v. Miglin, 279 Ill. App. 3d 270, 281 (1st Dist. 1996). Parker “must set forth with specificity the legal services provided, the identity of the attorney providing the legal services, an itemization of the time expended for the individual service, and the hourly rate charged.” Prime Location, slip op. at 4, citing J.B. Esker & Sons, 325 Ill. App. 3d at 283. While Parker must present a “sufficient basis” for determining whether the requested charges are reasonable, the Board may also consider “the entire record and its experience and knowledge of the case” in assessing whether the charges are reasonable. Prime Location, slip op. at 4, citing Cretton v. Protestant Mem’l. Med. Cent., 371 Ill. App. 3d 841, 868, 864 N.E.2d 288,315; Sampson, 279 Ill. App. 3d at 281, 664 N.E.2d at 289.

In determining whether Parker’s request is reasonable, the Board may consider factors including “the skill and standing of the attorneys employed, the nature of the case, the novelty and difficulty of the issues involved, the degree of responsibility required, the usual and customary charge for the same or similar services in the community, and whether there is a reasonable connection between the fees charged and the litigation.” Prime Location, slip op. at 4, citing Cretton, 371 Ill. App. 3d at 867-68, 864 N.E.2d at 315; Sampson, 279 Ill. App. 3d at 281, 664 N.E.2d at 289. The Board may apply its own expertise to “assess the time required to complete particular activities.” Cretton, 371 Ill. App. 3d at 868.

Parker argues that its appeal “involved a significant issue pertaining to the proper interpretation and application of the Board’s regulations governing rates which cover multiple components.” Req. at 3-4. Parker asserts that its “legal costs were reasonable given that the case could not be resolved on the basis of legal briefing alone” but witness testimony at a hearing.

Req. at 3. Parker adds that “the Board has generally awarded litigation costs whenever the petitioner has prevailed on the issues completely or substantially.” *Id.* at 2 (citations omitted).

Parker further argues that the Board has recognized Mr. Shaw’s experience in UST appeals. Req. at 2, citing Prime Location, slip op. at 6. Parker adds that the Board has accepted Mr. Shaw’s hourly billing rate as reasonable in earlier awards of legal fees. Req. at 2, citing Benton, slip op. at 3.

Parker points out that Mr. Shaw’s affidavit is modeled on previous affidavits submitted to the Board and found to be sufficient. Req. at 1, citing Prime Location, slip op. at 5. His affidavit is accompanied by a seven-page invoice summarizing fees and costs. Aff., Exh. A. From the affidavit and summary, the Board can determine the date of services; a description of services; the hours and hourly rate billed; and the fee charged. *Id.* Mr. Shaw’s services began on December 3, 2018, a short time after IEPA issued its contested determination on November 15, 2018. His services continued to May 31, 2023.

Mr. Shaw’s summary totals 99.30 hours for total fees of \$19,820.¹ Exh. A at 6; *see* Aff. at 2. The summary describes work performed and the time allocated to that work in tenths of an hour. Exh. A. The summary also includes \$234.00 of itemized costs: \$2.00 for photocopying, \$157.00 for computer-based legal research, and the Board’s \$75.00 filing fee. *Id.* at 7. Mr. Shaw’s affidavit states that “[c]harges for computer-based legal research are made in proportion to the amount of time used in a matter.” Aff. at 2.

The Board finds that the listings are itemized specifically enough to assess the reasonableness of the charges. *See* Prime Location, slip op. at 5, citing Sampson, 279 Ill. App. 3d at 281-82, 664 N.E.2d at 289. The summary submitted by Parker is generally similar to information provided in other UST cases in which the Board has directed IEPA to reimburse legal fees. *See, e.g.,* Dersch Energies, v. IEPA, PCB 17-3, slip op. at 4 (Oct. 20, 2022); Burgess v. IEPA, PCB 15-186, slip op. at 5-6 (Feb. 4, 2016) (Burgess). As noted above, IEPA has not filed a response or disputed the reasonableness of the requested fees and costs.

The Board concludes that this appeal presented significant issues regarding IEPA’s review and determinations under the UST program. Dersch, slip op. at 4; Burgess, slip op. at 6, citing Pak-Ags, slip op. at 7; Chatham BP v. IEPA, PCB 14-1, slip op. at 6 (Feb. 5, 2015). Based on its review of the record and authorities including prior Board decisions, as well as the absence of an IEPA response to the motion, the Board finds Parker’s requested legal fees and costs to be reasonable. Accordingly, the Board will exercise its discretion under Section 57.8(1) of the Act to grant Parker’s unopposed request and direct IEPA to reimburse the requested \$20,054.00 in legal fees and costs.

The Board incorporates by reference its findings of fact and conclusions of law from its May 4, 2023 interim opinion and order. This final opinion constitutes the Board’s findings of fact and conclusions of law.

¹ The invoice includes 0.2 hours showing “NO CHARGE.” Exh. A at 1, 6.

CONCLUSION

The Board finds that Parker's appeal sought payment from the UST Fund and that it prevailed before the Board under Section 57.8(l) of the Act (415 ILCS 5/57.8(l) (2020)). The Board exercises its discretion to award legal fees and directs IEPA to reimburse Parker \$20,054.00 from the UST Fund.

ORDER

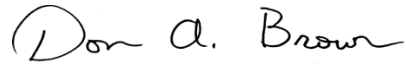
1. The Board orders IEPA to reimburse Parker the \$3,755.42 deducted from Parker's request for reimbursement.
2. The Board grants Parker's request to authorize payment of attorney's fees and directs IEPA to reimburse Parker \$20,054.00 in legal fees from the UST Fund under Section 57.8(l) of the Act. 415 ILCS 5/57.8(l) (2020).

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2020); see also 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; see also 35 Ill. Adm. Code 101.902, 102.700, 102.702. Filing a motion asking that the Board reconsider this final order is not a prerequisite to appealing the order. 35 Ill. Adm. Code 101.902.

Names and Addresses for Receiving Service of Any Petition for Review Filed with the Appellate Court	
Parties	Board
Patrick D. Shaw Law Office of Patrick D. Shaw 80 Bellerive Road Springfield, Illinois 62704 pdshaw1law@gmail.com	Illinois Pollution Control Board Attn: Don A. Brown, Clerk 60 East Van Buren Street, Suite 630 Chicago, Illinois 60605 don.brown@illinois.gov
Illinois Environmental Protection Agency Attn.: Melanie A. Jarvis, Assistant Counsel 1021 North Grand Avenue East PO Box 19276 Springfield, Illinois 62794-9276 melanie.jarvis@illinois.gov	

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on July 6, 2023, by a vote of 3-0.

A handwritten signature in cursive script that reads "Don A. Brown". The signature is written in black ink and is positioned above the printed name and title.

Don A. Brown, Clerk
Illinois Pollution Control Board